

## ADR and Access to Justice: Current Perspectives\*

ELLEN E. DEASON,\*\* MICHAEL Z. GREEN,\*\*\* DONNA SHESTOWSKY,\*\*\*\*  
RORY VAN LOO,\*\*\*\*\* ELLEN WALDMAN\*\*\*\*\*

ELLEN DEASON: Welcome to the 2018 AALS Annual Meeting Alternative Dispute Resolution Section program. We thank the Litigation Section for their co-sponsorship of this presentation.

I will introduce the panelists by name and school and then they will each provide a more substantive introduction in a minute. At the far end is Michael Green from Texas A&M University School of Law. Next to him is Rory Van Loo from Boston University School of Law. Next in line is Ellen Waldman from Thomas Jefferson School of Law and sitting next to me is Donna Shestowsky from UC Davis School of Law.

Unfortunately, Deborah Masucci is unable to be with us today. She is the co-chair of IMI, the International Mediation Institute. IMI initiated the Global Pound Conference to examine issues surrounding access to justice for commercial disputes. This involved twenty-nine events held during 2016-2017 in twenty-four different countries around the world. The events were attended by over 3,000 stakeholders representing parties, lawyers/advisors, mediators, arbitrators, judges, legislators, court personnel, and academics who discussed the same series of questions at each of the meetings. So, it provides a very rich source of data about the attitudes of dispute resolution participants that reveals how they experience commercial dispute resolution, what they think is desirable for the future, and the factors they see as promoting and inhibiting change.<sup>1</sup> I'll be interjecting comments about some of the results.

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\*\* Joanne Wharton Murphy/Classes of 1965 and 1973 Professor in Law, The Ohio State University Moritz College of Law

\*\*\* Professor, Texas A&M University School of Law

\*\*\*\* Professor, School of Law; Affiliated Faculty, Department of Psychology, University of California, Davis.

\*\*\*\*\* Associate Professor, Boston University School of Law

\*\*\*\*\* Professor, Thomas Jefferson School of Law

<sup>1</sup> The best place to find this data is on the Global Pound Conference website. GLOBAL POUND, <http://globalpound.org/> (last visited, Apr. 8, 2019). Some preliminary results are discussed in Deborah Masucci, *Access to Justice—The Road Ahead: What is the Role of*

I want to give you a roadmap for our program. We will not be delivering individual papers but, rather, hope to have a discussion. We are planning to spend thirty minutes on introductions for the purpose of allowing you to identify the source of each panelist's perspectives. We will then use an hour, more or less, for a discussion among the panel. That will leave fifteen minutes for audience questions and participation. Because we will be publishing an edited transcript, we ask that you hold your questions until the end.

Access to justice is a broad topic, and we cannot cover everything. You will notice a few major omissions. Most notably, we are not going to emphasize consumer pre-dispute arbitration agreements. This is not because they are not important, but because much has been written and said on this topic, and it could easily swallow the whole discussion. Also, we are probably not going to say very much about restorative justice, and I am sure you will notice some other holes. We invite you to raise missing issues in your comments.

Let me start with a few opening remarks. We are building upon earlier panels on access to justice at this meeting. At the ones I attended, I have heard two different themes. One is about the availability of lawyers and the value of legal representation, emphasizing that having a lawyer is a key aspect of access to justice. Another theme asks whether the legal system is providing justice aside from the question of adequate representation in individual cases. This critique emphasizes the extent to which the litigation system is stacked, and ways in which laws fail to recognize the individual realities of the disadvantaged. Both these themes are highly relevant to the role of dispute resolution in access to justice.

Those of you who were at the plenary program this morning on Access to Justice heard a question from the audience specifically about ADR, with reference to the role of mediation. In response, Martha Minow opined that mediation is part of the solution, but also troubling. She labeled mediation as

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*the Lawyer/Advisor and Education?*, 40 FORDHAM INT'L L.J. 973 (2017). The Spring 2018 issue of Dispute Resolution Magazine features articles on the Global Pound Conference. See Deborah Masucci, *The 2016-2017 Global Pound Conference*, DISP. RESOL. MAG., Spring 2018, at 6; Thomas D. Barton & James P. Groton, *40 Years on, Practitioners, Parties, and Scholars Look Ahead*, DISP. RESOL. MAG., Spring 2018, at 9; Lela Porter Love, Lisa Blomgren Amsler, & Mansi Karol, *Dispute System Design Can Help*, DISP. RESOL. MAG., Spring 2018, at 15; Anita Phillips, *Asia-Pacific GPC Participants Want Enforceable Decisions and Efficient Processes*, DISP. RESOL. MAG., Spring 2018, at 21; Deborah Masucci, *Now What?*, DISP. RESOL. MAG., Spring 2018, at 26.

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a “frenemy”<sup>2</sup> of access to justice. So, we will try to build on some of these themes.

Our field has a long history of debate on the relationship between dispute resolution and access to justice. There is a rich literature that critiques mediation as impeding the access of disadvantaged groups to justice and often this literature emphasizes the importance of enforcing legal rights. There is also a counterpoint in the literature that values voice and autonomy in the disputing process. It places an emphasis on procedural justice and remedies beyond those that are available in court. Our discussion is set in the context of this debate.

I have asked the panel members to give us a brief introduction to their work with the goal of defining the perspectives that they bring to access to justice issues. We will start with Rory Van Loo.

RORY VAN LOO: My research focuses on consumer law and the intersection between regulation and technology.<sup>3</sup> So when I first started looking into dispute resolution, I thought I would be writing about the area that Ellen alluded to earlier, which was pre-dispute arbitration agreements, because that is where a lot of the literature is. And then, once I started digging, I realized that most incidents are not settled or handled in courts and or arbitration, but inside the corporation itself. Just to give an example, the American Arbitration Association handles about 1,500 consumer disputes each year, last I looked, which was a few years back. And eBay handles sixty million disputes internally between buyers and sellers. Comcast has a million touch points in its customer service department with consumers each day. Comcast is the most hated company in America (laughter). So, that number may not necessarily be representative of all companies.

So the point of what I was just saying is that if you look at the numbers for consumer disputes, the vast majority unfold—begin and end—with some kind of communication with businesses. Not in arbitration. Not in the courts. And just to map out this ecosystem a bit, the customer service department is the main player, if you will, in the business sector, but it’s not the only one. In today’s increasingly financially- and technologically-intermediated world, there is often another business involved in any given transaction. We use credit cards and thus we can go to our credit card company to dispute an issue that we have with the merchant that sold us the goods, for example The Home Depot. We may rent a home from somebody (through Airbnb) or pay for a ride (through Uber) and maybe have a dispute with the homeowner or the driver and there will be an intermediary third-party corporation that decides what is

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<sup>2</sup> A colloquial term combining “friend” and “enemy.”

<sup>3</sup> See, e.g., Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547 (2016).

going to happen with that dispute. So there is the customer service department and there are financial and technological third-party intermediaries that increasingly will become involved in consumer disputes.

And then there are reputation mechanisms. A few years back a musician, David Carroll, was flying on an airplane and, as he was sitting on the tarmac waiting for the plane to take off, he heard someone say, "Oh look, they're throwing guitars around out there." He looked down and, sure enough, saw the United baggage agent tossing guitars onto the conveyor belt to get them on to the plane. And, when he got to his destination, he realized that his new guitar was badly damaged to the tune of about \$1,200.00, which is a lot to a struggling musician. And, so he went through United's various processes for trying to get compensated for that. He went to the claims agent on the ground who told him, "You need to call this number." So, he called the number. And when he called the number, they told him, "You had only 24 hours." So he went through all of these hoops and finally at the end of nine months, after banging his head repeatedly on the United wall, he got what he figured was the final "NO." So what he did as a musician was record a song about the experience and put it up on YouTube. And it has as the catchy chorus line—"United breaks guitars"—over and over again.<sup>4</sup> It got 100,000 hits on the first day on its way to 15 million overall. And, as you might have guessed, United called him up and said, "We will give you a new guitar and pay you what you want." They also revamped their dispute resolution processes as a result of that. So now, websites (like YouTube) that have nothing to do with the initial transaction with consumers have entered into the dispute resolution realm.

To answer the specific question about what perspective I bring, I look at dispute resolution through the lens of consumers and also economic analysis, in large part because the consumer business transaction is so driven by how corporations believe that a given dispute resolution process will pan out in terms of dollars. I am interested in questions such as: How do these processes work? How well do they work? And, what role should the law play, if any?

MICHAEL GREEN: Hello, can you hear me in the back? Ok. I write about workplace law issues and the intersection of ADR, sometimes with that and race. And, so in particular I believe the reason why Ellen even thought about asking me to be on this panel is she had heard from one of her colleagues that I was involved in putting together a symposium that was held at SMU and

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<sup>4</sup> Sonsofmaxwell, *United Breaks Guitars*, YOUTUBE, (Jul. 6, 2009), <https://www.youtube.com/watch?v=5YGc4zOqozo>.

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I am very proud of the result of that symposium. So, I feel like my only purpose here is to highlight to you the significance of that symposium (laughter) and the wonderful people who were involved, not only my own work. But, I see many of them out there and I will mention them in a second.

ELLEN DEASON: You're too modest, Michael (laughter).

MICHAEL GREEN: But, the significance of that is that we actually wanted to look at prejudice and bias in ADR. And, starting with Richard Delgado's landmark co-authored article which is now thirty-something years old,<sup>5</sup> we ended up bringing together several scholars to talk about prejudice and bias. I think it has been theoretically published, but it hasn't come out yet officially. I think it is in the mail and it will be on the website within the next week or two.<sup>6</sup> So you should see a really important contribution to the issue of bias and prejudice in ADR. It starts off with Richard Delgado doing a foreword,<sup>7</sup> looking backward, actually, at his own piece and then he makes a new contribution with an updated version of his article.<sup>8</sup>

And then, there are several other people who contribute. It's actually two books as a symposium, all with people talking about prejudice and bias. I deal with it from a workplace perspective. Andrea Schneider has a paper, "Negotiating While Female" which looks at female issues in negotiation.<sup>9</sup> Charles Craver talks about bias in negotiation.<sup>10</sup> Nancy Welsh talks about the magic of mediation.<sup>11</sup> Carol Izumi talks about implicit bias in mediation.<sup>12</sup> Pat Chew talks about the context of arbitration.<sup>13</sup> And, there are several more, including Eric Yamamoto<sup>14</sup> and others who I think will add such rich resources

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<sup>5</sup> Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee, & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

<sup>6</sup> *ADR Symposium*, SMU L. REV., <http://scholar.smu.edu/smulr/vol70/>, (last visited Apr. 8, 2018).

<sup>7</sup> Richard Delgado, *Alternative Dispute Resolution: A Critical Reconsideration*, 70 SMU L. REV. 595 (2017).

<sup>8</sup> Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611 (2017).

<sup>9</sup> Andrea Kupfer Schneider, *Negotiating While Female*, 70 SMU L. REV. 695 (2017).

<sup>10</sup> Charles Craver, *Do Alternative Dispute Resolution Procedures Disadvantage Women and Minorities?*, 70 SMU L. REV. 891 (2017).

<sup>11</sup> Nancy Welsh, *Do you Believe in Magic? Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721 (2017).

<sup>12</sup> Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681 (2017).

<sup>13</sup> Pat Chew, *Contextual Analysis in Arbitration*, 70 SMU L. REV. 837 (2017).

<sup>14</sup> Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claims Development*, 70 SMU L. REV. 765 (2017).

to this subject. So, I highlight them to you and I think that is the only reason that I am here, is to highlight that to you.

What I will say though, about my own paper and how it fits with this panel, is that it is basically a spin-off of Richard Delgado's paper, called *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*.<sup>15</sup> I look at the Black Work Matters movement, which is related to the Black Lives Matter movement. And, I look at that in context of how ADR might work for black workers. A section on *Negotiating While Black*<sup>16</sup> looks at issues for black workers and difficulties they may have when attempting to negotiate concerns such as salary or work schedules while recognizing issues of stereotype threat and covering may affect their negotiation positions. Another section on *Mediating While Black*<sup>17</sup> addresses the same concept but in the context of having a neutral mediator attempt to facilitate negotiation of workplace disputes involving black workers. And a section on *Arbitrating While Black*<sup>18</sup> explores resolution of black worker disputes via arbitration agreements. The intent is to highlight the barriers for black workers trying to resolve disputes and looking at whether or not ADR is a barrier. And I make a final suggestion on a type of workplace system that might help deal with the concerns about prejudice in ADR.<sup>19</sup> All of this gives you access to justice, to me, in terms of the ability of black workers to be able to vindicate their rights in the workplace.

DONNA SHESTOWSKY: Thanks for coming to our panel. My perspective stems from my background in psychology. I have a PhD in Psychology; my training is in social and personality psychology. All of my

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<sup>15</sup> Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639 (2017).

<sup>16</sup> *Id.* at 647-54.

<sup>17</sup> *Id.* at 654-57.

<sup>18</sup> *Id.* at 657-61.

<sup>19</sup> *Id.* at 661-66, 71-74 (referring to the employer and union and the collective bargaining agreement at issue in the Supreme Court's 2009 decision in *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009), and suggesting that their subsequent agreement aimed at preventing further litigation of their disputes, the Post-Pyett Protocol, provides an excellent framework for black workers seeking justice in the workplace if a few modifications are made to that Protocol); see also Deborah Masucci, *How Labor and Management are Using Mediation*, ABA JUST RESOLUTIONS E-NEWS, (Oct. 2016), available at [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/newsletter/oct2016/masucci\\_using\\_mediation.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/oct2016/masucci_using_mediation.authcheckdam.pdf) (describing the *Pyett* Protocol and its mediation process as a viable dispute resolution mechanism), available at [https://www.americanbar.org/groups/dispute\\_resolution/publications/JustResolutions/oct2016-e-news.html](https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/oct2016-e-news.html).

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scholarship falls at the intersection of psychology and law.<sup>20</sup> Much of my recent work has focused on what I call the “psychology of litigants,” meaning that I examine how they evaluate different legal procedures such as negotiation, arbitration, jury trials, judge trials, negotiation, and the like. And, I do much of that in the context of the procedural justice paradigm.

I am the Principal Investigator for a longitudinal study sponsored by the National Science Foundation which examines how litigants compare procedures both before and after using them. I hope to shed light on the big question of whether people’s attitudes towards procedures depends on when you ask them to evaluate them—either *ex ante*, which gets at their initial preferences as well as their expectations for procedures—or *ex post*, which concerns how they evaluate them after they actually use them. That said, my perspective on the question of access to justice is that the perspective of the *litigants* really is the one that should matter to us the most. And it is often the one that is quite ignored.<sup>21</sup> We as lawyers and policy makers can build an amazing system from our own perspectives. But if litigants can’t access the system, don’t *believe* they can access it, or don’t feel that it is just, then clearly we have failed. So, that is the perspective that I bring.

ELLEN WALDMAN: I write in the field of mediation ethics.<sup>22</sup> And, I have started to believe that perhaps our ethics are getting in the way of good practice. We have had concerns expressed about racial minorities. And, we have had concerns about the attitudes of disputants. I guess I am also worried about disputants, and largely through the lens of socio-economic inequality.

A couple of years ago in the Ohio State Journal, Professor Lela Love, whom many of you know, and I co-authored an article looking backwards and forwards at mediation’s trajectory.<sup>23</sup> We began by noting that we both run mediation clinics where law students are placed in small claims court and mediating with the litigants there. And, Professor Love told a heart-warming story about a family from Ghana that had suffered some internal friction and how her law students helped the family come together and resolve their differences. And, I told a story about how concerned I was about uninformed decisionmaking. So, the Cardozo clinic came out looking really good. And,

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<sup>20</sup> See e.g., Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014); Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793 (2016).

<sup>21</sup> See e.g., Donna Shestowsky, *Disputants’ Preferences for Dispute Resolution: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008).

<sup>22</sup> See e.g., ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARY* (2011).

<sup>23</sup> Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123 (2016).

my students were inadvertently thrown under the bus by their professor. But, my orientation is to have concerns about the disputants who come to our lesser courts, as they are often called—Landlord/Tenant, Small Claims, Family Court—and are referred to mediation and then expected to make decisions which to them have really serious consequences, without the informational platform that they need and deserve. And, that is the context in which I am operating and writing in.

ELLEN DEASON: We thought that before we get to the heart of the discussion about *access* to justice, it would be important to say a little bit about concepts of *justice*. And, so my first question to the panel is—based upon the context in which you work—what do you identify as the essential elements of justice?

ELLEN WALDMAN: I just want to follow up just a little bit. For me, I think justice is, of course, difficult to define. But, justice cannot occur in the absence of informed decisionmaking. We talk a lot in alternative dispute resolution about self-determination and the importance of autonomy in decisionmaking. And, much of that is in distinction to a process where a judge or arbitrator is telling parties what they will do. We are very proud of the opportunity that we provide disputants to make their own decisions and determine their own destiny. But, I think we give short shrift to *our* obligation to ensure that disputants' decisions are being made with enough information. You can't make a decision that reflects your values unless you know the context and the consequences of those choices.

DONNA SHESTOWSKY: Piggy-backing on that point, I could not agree more about informed consent and how important that is. And, just to add to that, following the procedural justice paradigm, I want to underscore the fact that justice is largely a subjective construct. So, if I am a litigant, even if one hundred of the best legal minds in the country, including those in this room, tell me that I got a really great outcome, I may still feel deeply dissatisfied with my experience if I think that it did not have certain elements relating to procedural justice. First of all, to feel like I was fairly treated, I would need to feel that I had an opportunity for *voice*, that is, that I could tell my version of the story. And that the procedure I used offered *neutrality*—meaning, if a decisionmaker was involved, that he or she applied not their personal opinions, but some set of rules that they would apply systematically to other people in similar situations. And that I was treated with *respect*, that is, that I was taken seriously, and that my concerns were taken seriously. And finally, if a third party was involved in determining the outcome of my dispute, that they were



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*trustworthy*, meaning that they were sincere, transparent, and were genuinely trying to do what is right.<sup>24</sup> There is a sense in the literature that bad actors can manipulate some of these elements to make people believe that their dispute was handled fairly. But in the absence of those situations, I think that these subjective elements really are critical components of justice.

MICHAEL GREEN: For me, when I think about “What is justice?” I think about righting wrongs in our society. And so, as some have mentioned, there is a subjective nature to that and you first have to agree that something is a particular wrong. But, if there is a consensus about certain wrongs in our society, for instance some people might think that there is a consistent wrong in our society about the imprisonment of black men. If there is a wrong, and there is a way in which to deal with that wrong, that is where we can deliver justice. However, I think that there is this thing (I don't know where it came from), it's not the “No Justice, No Peace,” that is, it's not the “N-O justice, N-O peace,” but the “K-N-O-W”—“If you know justice, that is when you know peace.”<sup>25</sup> So, if you have justice, you have peace.

RORY VAN LOO: I also think about justice in a largely subjective manner, and that raises the question of what is the reference point? One common reference point in the literature is that people are bargaining the shadow of the law. But at least for consumer disputes, the vast majority of them don't think about them in terms of reference to the law. I believe that consumers and businesses are more often bargaining with each other in the shadow of norms, and not of the law. Those norms have both internal components of fairness—what the consumer's sense of fairness is, especially—and also external—what would other consumers potentially get through similar dispute resolution processes.

I think this touches on inequalities to some extent. I am thinking of the Bank of America patent on software that enables the customer service representative to have access not only to all the records of the individual customer they are on the phone with, but also to that customer's families' records at that bank—to get a sense of the aggregate value, the net value of this person if the bank were to make them mad. For instance, would we be alienating their family? Also, would they be pulling a lot of money? And so, whether or not an individual gets a fee waived, for example, may or may not

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<sup>24</sup> For a succinct summary of these principles, see Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REV. 26 (2008).

<sup>25</sup> I have now remembered the source of the “Know Justice, Know Peace” moniker that I referred to in the presentation. See Isabelle R. Gunning, *Know Justice, Know Peace: Further Reflections on Justice, Equality, and Impartiality in Settlement Oriented and Transformative Mediations*, 5 CARDOZO J. CONFLICT RESOL. 87, 88–89 (2004).

seem just, in isolation. The answer may change depending not only on an individual's sense of fairness in terms of what they immediately experience, but also depending on any differences in how others with a similar dispute are being treated.

ELLEN DEASON: One way we deal with fairness in how others are to be treated in similar circumstances is by applying the law. So, I would like to jump in and add what I believe Deborah Masucci would say if she were here, which is that often when people say, "access to justice," they mean "access to the courts." That is especially true when we are talking about pre-dispute arbitration clauses where enforcement denies access to court. And I think that this emphasis is also what is reflected in the very justified concern for legal representation.

But does denial of access to courts really mean denial of access to justice? What Deborah said in our prior discussion is that, in the international context, we should be aware that the courts are *not* the gold standard for justice. In many countries, there are not only problems with huge delays, but also with corruption and distrust of the judicial system. And that has led, in the international context, to people and companies in many countries looking to arbitration systems in order to get better justice than one could get through the application of law in the national court system.

Let's now turn to the heart of the issue for today, which is access. My question is: From your perspective, what are the major issues regarding access to justice using the ADR processes? And embedded in that question is: What do you see as the most important barriers? And what you think needs to be done to reduce them?

We have several general themes on this topic. I would like to start with the lack of information about the processes that are available. I will ask Donna to kick off the discussion.

DONNA SHESTOWSKY: To me, the big issue on this front is that parties don't seem to know what their options are. Some of my own research supports this view and I am going to share some of the takeaways with you.<sup>26</sup> My team and I surveyed over 330 litigants from three different state courts in the country.<sup>27</sup> These litigants had a wide variety of different case-types including

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<sup>26</sup> See Donna Shestowsky, *When Ignorance is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017).

<sup>27</sup> The study courts were the Third Judicial District Court, Salt Lake City, Utah; the Superior Court of California, Solano County; and the Fourth Judicial District, Multnomah County, Oregon.

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medical malpractice, personal injury, and property. We conducted phone surveys with them within three weeks of their cases being closed in court. The only people who were eligible for this study were litigants who had cases in their court that made them eligible for both court-sponsored mediation as well as court-sponsored arbitration. And, we asked them two questions: 1) Did the court where your case was filed offer a mediation program? And, 2) did the court where your case was filed offer an arbitration program? I can't emphasize enough that the correct answer to both questions for everyone in the study was "Yes."

Let's talk about the mediation program first. Less than 24% correctly identified their court's mediation program. Roughly half of them admitted that they did not know whether their court offered mediation or not. And, about 22% were flat out wrong by saying, "No, my court did not offer mediation." We observed a similar pattern for arbitration. About 27% of litigants correctly identified their court's arbitration program. About half said "I don't know," and, about 22% were flat out wrong by saying, "No." When we collapsed the responses across the data for both mediation and arbitration, we found that less than 16% knew that their court offered both of those programs. Less than 16%!

We also examined a question related to representation. We looked at whether people had a lawyer or not. We wanted to see if that made a difference in terms of whether litigants were able to identify their court's ADR programs. We found that it did not matter. People were not more knowledgeable about their options they had if they a lawyer for their case. This raises interesting questions about how much education they are getting about these options from their attorneys. Apparently, not very much.

So, to me the big issue in all of this in terms of access is: since justice is so subjectively construed . . . measured by the litigants themselves . . . the litigants themselves need to know what their options are and be able to make informed decisions about whether to use them. How can they do that if they don't know what options are available to them? Both lawyers *and* courts must do a lot more in terms of educating litigants. We can't just assume that the lawyers are doing this.

What I suggest in terms of improving access to justice is that courts should require lawyers to educate their clients. Some courts already do this. But, not every court does. And, I think a really good example, a model example of this kind of requirement, is set by the U.S. District Court of Northern California which requires not only the lawyers to sign off on the fact that they educated their clients about options in ADR, but actually asks the parties themselves to sign off on the fact that they were educated about their options. So, they have to sign off that they read the court's handbook describing the court's ADR procedures. They have to sign off on the fact that

they discussed court-connected options as well as private ADR options. And, that they considered whether ADR was a good option for their case. Courts can go a step further by advertising clear penalties for attorneys who don't comply with such rules.

I also found, in the course of my own literature review, that some courts do other exciting and innovative things for small claims cases, and also for family law cases. These innovations offer great ideas for advancing access to justice, keeping in mind that many litigants are self-represented. Some courts have ADR information meetings for parties, which they offer on a periodic basis. Some of them make these sessions mandatory and some offer them on a voluntary basis. And, some courts have self-help desks, staffed by lawyers, where litigants can go to get information about these options. So, these are other ideas we could consider as well, in terms of improving access to justice.

And then, finally, I think better education on the part of lawyers is absolutely critical. Some really interesting and important research by Roselle Wissler found that when you ask lawyers how much they advise clients about ADR, how often they advise them about their options, it is often related to their personal level of experience with ADR procedures.<sup>28</sup> She found that lawyers are more likely to advise clients to try ADR if they have prior exposure to ADR—meaning that they served as a lawyer in one of these alternatives, as a neutral in one of these alternatives, or even just attended a CLE program about ADR. So, I think one solution on the issue of these access to justice barriers is that we need to find better ways to mandate lawyer exposure to ADR.

ELLEN DEASON: There's been a lot of talk about the promise of technology. What role did the court websites play in your study?

DONNA SHESTOWSKY: That is a great question. Yes, all of these courts had information about their ADR programs on their websites. And that clearly was not enough in terms of educating litigants about what alternatives they had. It is important to keep in mind that members of certain communities are relatively less likely to gain access to information that is available online. The Pew Research Center has conducted important survey research looking at what kinds of communities have less access to the internet. Although over 80% of Americans report using the internet, there are notable income, age, and race

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<sup>28</sup> Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPPERDINE L. J. 199 (2002).

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disparities in internet use,<sup>29</sup> and those with disabilities are also less likely to use the internet.

ELLEN DEASON: Others on this topic?

ELLEN WALDMAN: I think this is an easy one. Who is going to argue against having attorneys inform their clients about the existence of ADR? Encouraging attorneys to play this educational role seems uncontroversial, sort of like supporting 4<sup>th</sup> of July fireworks and apple pie.

DONNA SHESTOWSKY: It is sad that the data revealed so much ignorance and that attorney representation didn't help.

ELLEN WALDMAN: If we can solve access to justice by tweaking attorney education in this regard I think we'd be in very good shape.

ELLEN DEASON: The data that came out of the Global Pound Conference supports the suggestions you've made. It indicates that participants see a need for both education initiatives and requirements that parties certify they have considered non-adjudicative options. One of the questions the participants discussed was "What is the most effective way to improve parties' understanding of their options regarding resolving commercial disputes?" The number one answer by a substantial amount was a desire for "education in business and/or law schools and the broader community about adjudicative and non-adjudicative dispute resolution options." In the last twenty years we have seen a proliferation of ADR courses offered by law schools and mediation clinics. In addition, many trial advocacy courses include a discussion of using mediation in the course of a matter. This has gone a long way toward educating lawyers, but these are not required courses so not all lawyers attend them. The second priority when answering the question about improving parties' understanding of their options favored "procedural requirements for all legal personnel and parties to declare they have considered non-adjudicative dispute resolution options before initiating arbitration or litigation."

MICHAEL GREEN: I would say that lack of information is a problem from a minority disputant's perspective. I do talk a little bit about this in the

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<sup>29</sup> See, e.g., Andrew Perrin & Maeve Duggan, Pew Research Center, *Americans' Internet Access: 2000–2015*, available at, <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/> (last visited Apr. 8, 2018).

section of my article on “Negotiating While Black”<sup>30</sup> and this is probably a problem for any smaller player who is up against a repeat player in any kind of negotiation. Lack of information will put the smaller player at a disadvantage. However, whenever we can create a mechanism to provide more information to the little guys in the dispute, it is always a good thing. And one of the things I highlight in my article includes a discussion of some studies that talk about how race may have been used either overtly or unconsciously in the negotiation process.<sup>31</sup> What hindered the black disputants in those processes was a lack of information. If you could level the playing field so that everyone had the same amount of information, that would help assist in the access to justice problem. That would limit the specific concern that some players have a lot more information in the process than others.<sup>32</sup>

ELLEN DEASON: How about in the consumer context, Rory?

RORY VAN LOO: So definitely in the consumer context there are some analogous issues in that some people don't necessarily know that they *can* complain. There are a lot of people who just assume that if they were late, they have to pay the \$50 fee, or whatever, because that's the rule of the company. Some of these consumers would save money if we were to let them know on a broader scale that they could actually complain, that they don't have to take whatever treatment they get, and that there are outlets through which they could see better dispute resolution in the consumer realm.

Also, just to throw in a different concept into this mix: competition. If you're Comcast and three-fourths of all households have really only one choice for cable or internet, you don't need to worry about how you resolve disputes with consumers. But if you are a retail store, or a hotel, and so on, you pay very close attention to any dispute that arises. In other words, one of the barriers to consumer dispute resolution in some markets is insufficient competition. A whole separate literature is addressing what is going on right now in antitrust and many are arguing that we don't necessarily enforce antitrust enough. Too often we have different licenses that provide barriers to even competing in the first place, and so on. I don't think the antitrust crowd

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<sup>30</sup> Green, *supra* note 15, at 652–54 (referring to how minorities' lack of information places them at a disadvantage in negotiations).

<sup>31</sup> *Id.* at 648–50.

<sup>32</sup> *Id.* at 654 (“Through mentoring networks, identity caucuses, or unions, black persons can meet similar role models who provide a positive reflection and offer social or business information to level the negotiating playing field. These groups help combat the application of negative stereotypes and also encourage self-affirming opportunities to show that negative stereotypes do not match the individual black person involved”).

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really thinks about dispute resolution in what it does. But, I think their work has really important implications for what the people in this room think about it.

ELLEN DEASON: In addition to problems with lack of information about what options are available, a second access issue that we identified is lack of information once disputants are using a process. Assuming we have passed the hurdles that we just discussed, and disputants actually get into a dispute resolution process, several kinds of lack of information become problematic. One of them is about using the process itself. And another is about the possible outcomes. Here is where legal entitlements and the lack of knowledge about them can become really important. I am going to ask Ellen to take up this topic.

ELLEN WALDMAN: In San Diego County, we used to have a legal advisor's office and we had a very vibrant mediation practice here for 20 years. And, we had small claims mediation taking place in South County, East County, and downtown. These legal advisor's offices were jam packed. And, whenever we had a disputant—and when I say “we” I mean my law students—when we had a disputant who really seemed quite at sea in terms of what their entitlements were, they would say, “We are here all day. Please go upstairs to our legal advisor’s office. Come down stairs again when you feel that you have a better sense of the legal landscape and we will be happy then to help you.” Then, as a result of draconian cuts in the state court budget, that office was shuttered. It really transforms the practice, and makes for very, very difficult decisionmaking, not just for the disputants, but also for the mediators. So, I think Small Claims is part of what Owen Fiss was worried about when he talked about the dangers of alternative dispute resolution for under-resourced parties.<sup>33</sup>

I want to provide a quote that describes Landlord/Tenant courts, but it could apply to any number of courts where the majority of disputants are unrepresented or, as they are often called, self-represented.<sup>34</sup>

Rent court, more than most other courts, is a theatre of class conflict in which businesses and their hirelings constitute a class of professional claimants exercising significant advantages over the individual defendants whom they bring before the court, who are

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<sup>33</sup> Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>34</sup> See e.g., Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, May 2013, available at <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>.

poor and poorly situated with respect to the attributes that garner respectful hearing in courtrooms.<sup>35</sup>

These are one-shotters who are very uncertain about what negotiation even means. “If they make me an offer, do I have the option to say ‘yes’ or ‘no?’ What else can I do?” Many of these disputants are not native English speakers and they really have very little idea what their rights are. Imagine being a tenant who is being subjected to an unlawful detainer action who doesn’t know about the implied warranty of habitability.

So, I agree with everyone else on the panel that procedural justice is very, very important. But, the norms that are reflected in some of our laws embody really important ideals of justice.<sup>36</sup> It is not *substantively just* to be forced to live in an apartment and pay rent and have rodents or have no heat from November to February. That is substantive. That has nothing to do with how you are treated in the dispute resolution process. So, I don’t think limiting our concern to procedural justice is sufficient. So, to restate this, we have unsophisticated disputants. They don’t know the legal landscape. They are referred to mediation. And, they are basically asked to make decisions without knowing their entitlement or the legal consequences.

Our ethical code basically emphasizes three principles: 1) self-determination; 2) impartiality; and 3) informed consent. There are other important principles: confidentiality and no conflicts of interest. But, these are the big three that you will see over and over again in most codes. In the context of mediation with unrepresented parties, I think that concern about impartiality has really eclipsed all other concerns. We are so worried that if we talk about legal norms, and the norm advantages one party and disadvantages another, that will pollute the mediator’s impartial stance and render the mediation a nullity, unsuccessful, unethical, a process we should not engage in. So then, when we start thinking about self-determination, we think, “Well, as long as a party is making their own decision and not being told what to do then we are passing muster when it comes to self-determination.” It’s a thin vision of autonomy, but it’s a vision that we live with.

And, when we move to informed consent, we focus a lot on whether parties understand the mediation process. Do they understand that the mediator doesn’t represent them even if the mediator is a lawyer or a law student? Do they understand that they can leave at any time? Do they understand that they can take a break? Do they understand that it is *their*

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<sup>35</sup> Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85 (1996).

<sup>36</sup> Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls’ Original Position*, 30 OHIO ST. J. ON DISP. RESOL. 391 (2016).



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process? Again, we gloss over what it is that they need to understand about the substantive decisions they are making. And, it is convenient for *us*; it is convenient for the mediator. Is this a good process for our unrepresented parties? I don't think so. It's an access to justice problem.

ELLEN DEASON: Do you think that if they could get effective representation it would solve the problem?

ELLEN WALDMAN: I think, . . . yes. And, actually it is a great irony. I wrote a very short article that's about mediation for the one percent and mediation for the ninety-nine percent.<sup>37</sup> It's ironic that when the parties lawyer-up and they walk into the mediation room with lots of representation, we are relatively untroubled by mediators who talk a lot about legal norms, because we're not worried that the parties in those cases—usually very sophisticated and well-resourced—are going to mistake the mediator's discussion for representation. Because, after all, they are amply represented. So, mediation for the one percent, actually involves a lot of evaluation and a lot of normative discussion. It is only in the context of poor, unrepresented parties that we are terrified about discussing legal norms. So yes, representation could do a lot. I think we can do better. I was thinking that maybe in my mediation class, instead of all of those simulations, we will work on a booklet. We have been in the courts for twenty years; we know the problems people have. Maybe we ought to be producing a booklet for disputants who are going into mediation. In other words, give them that information up front and have them read it. I don't know . . . I think that there are solutions.

DONNA SHESTOWSKY: I think these points are really excellent. I would just add one little thought, which is that there is some interesting research suggesting that lawyers often misunderstand their clients' objectives.<sup>38</sup> So, to the extent that lawyers may be great at articulating legal arguments and applying legal norms, sometimes those are inconsequential to the client's actual goals.

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<sup>37</sup> Ellen Waldman, *Inequality in America and Spillover Effects on Mediation Practice: Disputing for the 1 Per Cent and the 99 Per Cent*, 35 LAW IN CONTEXT 24 (2017).

<sup>38</sup> See e.g., Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties* (2009), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1348542](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348542); Tamara Relis, *It's Not About the Money!: A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITTSBURGH L.REV. 701 (2007); Austin D. Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC. REV. 737 (1988); William L.F. Felstiner, & Austin Sarat, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93 (1986).

MICHAEL GREEN: So, this issue of the unrepresented party is a really interesting dilemma in terms of how you deal with access to justice. Most of the things I have addressed recently regarding access to justice focus on the lack of *legal* representation and how you address that issue.<sup>39</sup> In my article, I talk about representation from unions—and really about workplace voice—as a mechanism to address some of these information disparities and some of the bargaining disparities that occur in the workplace when employees—especially employees of color—are trying to navigate problems.

There certainly needs to be more legal representation for employees pursuing workplace discrimination claims.<sup>40</sup> But if you look at empirical results for employment disputes, even in the court system when there are attorneys involved, employees still lose a lot.<sup>41</sup> And, so that is not a just system to me. Going back to my initial statement about justice, a just system is a system where you know that wrongs can be righted. And most people feel when they look at the federal court system data on employment discrimination claims, that it's not a system that is just. So, if you look at other ways to address that employment discrimination claim, the employee needs representation in ADR as much as in the court system.<sup>42</sup>

But, that representation may take certain forms. Earlier today at the plenary, they were talking about how access to information may need to take different forms. It may not just be lawyers. We may need to get beyond unauthorized practice of law concerns and figure out other ways to help individuals seek justice as they navigate the impediments presented by the legal process.<sup>43</sup> Unions deal with those issues all the time when they are

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<sup>39</sup> See Michael Z. Green & Kyle T. Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits When a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?* 20 NYU J. OF LEG. & PUB. POL'Y 403, 405 (2017) ("Concerns about 'access to justice' typically refer to the adequacy of a society's legal system to provide all people with legal representation in a meaningful legal forum") (citing Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1786–87 (2001)).

<sup>40</sup> See e.g., Green, *supra* note 15, at 668–69 & n.175 (citing Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 383–84 (2010)).

<sup>41</sup> *Id.* at 658 & n.97 (citing Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?* 46 WAKE FOREST L. REV. 185, 207–08 (2011)).

<sup>42</sup> *Id.* at 668–69.

<sup>43</sup> See Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 76–77 (2004) (discussing unauthorized practice of law concerns in dispute resolution proceedings for employment claims).

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representing clients. I've met many a union representative who represents their clients much better than the attorneys on the other side.

ELLEN DEASON: At the panel yesterday for the AALS Section on Minority Groups, there was some discussion relevant to this. Someone made a comment that the "law is not justice." They were referring to structural problems with the law, systematic problems that require more than our usual solution of "let's provide a legal representative." And, in addition, we know that even the solution of representation is—in so many situations—simply not an option. Rory mentioned consumers dealing with Comcast; there is no representative involved in that picture.

RORY VAN LOO: Yes, this is where it gets tough to think about how we might improve the consumer dispute resolution realm. Class actions definitely can help. But we live in a world without class actions. Nor are class actions perfect. On average roughly thirty-three percent of the payout goes to lawyers, and a lot of people don't sign up. When I think about having a representative for a \$50 or \$30 dispute, it doesn't make sense.

But there is an interesting new company called "David," as in David and Goliath. What David does is fight small consumer disputes for about thirty percent of the cut. So, if you are trying to get rid of a fee, or whatever it may be, you just give them the information. Because these consumer disputes often happen in patterns, they know what to do, and they know who to call, and they know what to say. They can have several people in their call center doing multiple things while they are on hold—because that is one of the techniques companies use to try to deter everyone. So, there are some private sector sources.

For those who have faith in regulation, you can imagine our regulators trying to pay more attention to the disputes that are submitted to companies. Financial regulators are doing this already. The Consumer Financial Protection Bureau is requiring banks—especially in the wake of Wells Fargo and their creation of millions of fake accounts and a variety of other transgressions—to look more closely at what is actually being said in those disputes. Even if it doesn't provide the individual with representation, the complaint auditing could create some form of redress. The idea would be that, if they find a pattern in the complaints, then whatever redress is deemed appropriate would be given to all consumers. So, it is kind of after-the-fact relief that rights the situation as if it had been settled.

ELLEN DEASON: The last major category of issues we want to discuss groups several issues together under what we are loosely calling the *quality* of the process. These are not problems in availability of processes, but rather

concerns about the justice that can be obtained in ADR processes if they are not of high quality.

One part of this is something that Deborah Masucci raised in an earlier conversation. She mentioned that there is a lot of criticism by litigants of court rosters of mediators. There is a perception of lack of adequate training and lack of adequate follow-through. There are shortcomings in the mentoring process; less experienced mediators are not paired up with more experienced mediators. And, more generally, there is a sense that courts are not doing a good job of monitoring quality. She found a desire among litigants for more standardized training and more qualification requirements for ADR professionals. That raises a lot of other issues. As some have pointed out, this could cause more difficulties with access to the profession by minorities. Does anyone on the panel have a reaction regarding mediator training and qualifications?

MICHAEL GREEN: So, the issue of the neutral . . . The National Academy of Arbitrators is the most esteemed body of labor arbitrators, the trade group of arbitrators that has been in existence for the longest period of time. These are the most experienced professional labor arbitrators. They have to have over sixty opinions in six years to even become a member.<sup>44</sup> They did a study several years ago,<sup>45</sup> and what that study indicated was that the typical arbitrator was sixty-two years old, and was a white male, with twenty-six years of experience. Only twelve percent of the arbitrators were women and less than six percent were non-white.<sup>46</sup>

Now, when you are talking about access to justice and you're talking about disputants—and even more so when you are talking about disputants who are bringing claims based upon either race or gender—this raises a concern that you don't have access to justice. You don't have someone who might understand your plight in society or might have experienced something similar to you so they might at least have a chance of understanding the nature of the claim at issue.

I raised this issue several years ago and someone tried to suggest that I was advocating for some kind of litmus test or color requirement. I said, “no,” because I wouldn't necessarily want Justice Clarence Thomas to be my

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<sup>44</sup> See NATIONAL ACADEMY OF ARBITRATORS, *Membership Guidelines*, available at <https://naarb.org/membership-guidelines/> (last visited Apr. 8, 2018).

<sup>45</sup> See Michael Picher, Ronald L. Seeber & David B. Lipsky, *THE ARBITRATION PROFESSION IN TRANSITION: A SURVEY OF THE NATIONAL ACADEMY OF ARBITRATORS* 11–12 (2000), available at <https://digitalcommons.ilr.cornell.edu/icrpubs/1/> (last visited Apr. 8, 2018).

<sup>46</sup> *Id.*

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arbitrator either (laughter). But, what I would look at is—do you have a system that at least provides opportunity for more women and people of color to be a part of it? So that an individual involved in the system doesn't look at it and feel there is no chance for justice and give up on it. I am not suggesting that you should have a specific person of color or woman.

In terms of the concept of matching race or gender with the neutral, in some instances, I think what I'd do would be to have co-mediators or co-dispute resolution professionals of mixed race or gender. That's not directly race-matching, but it's an opportunity to increase diversity. Carol Izumi has addressed this issue<sup>47</sup> and Isabelle Gunning<sup>48</sup> and I<sup>49</sup> have mentioned this as well. You are looking at expanding the dispute resolution process in a way to provide more fairness. If you have a system designed in a way that gives the appearance that there is no chance to have a neutral of color, I think that's going to be problematic for access to justice.

RORY VAN LOO: This isn't exactly on point in terms of the mediator, but today an increasing number of disputes are being decided and intermediated by algorithms. You think you are talking to a human being on the phone, but they have a computer keyboard, and an algorithm is running in the background. In some regard, that algorithm is a neutral intermediary deciding the dispute. But we also know that if it is using factors such as the number of Twitter followers and the wealth of family members, those factors can start to become proxies for various kinds of discrimination. So even with the dispute resolution realm moving towards algorithmic intermediations, that's not going to solve this problem.

MICHAEL GREEN: I do want to add something because your question was also about mentoring, right? So, I've identified a problem, but how do we address that issue? How do we get more women and people of color in these positions and in these fields? There have been attempts to try and do that, but those attempts have not been very successful.<sup>50</sup> And that takes you back to Richard Delgado's whole argument. In his most recent article, I think he's still

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<sup>47</sup> See Carol Izumi, *Implicit Bias and the Illusion of Mediator Impartiality*, 34 WASH. U.L. J. L. & PUB POL'Y 71, 109–16, 136–39 (2010) (criticizing race matching of mediators, in general, but also suggesting usefulness of racial matching in a co-mediator).

<sup>48</sup> See Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. Disp.

Resol. 55, 89 (1995) (finding that “[m]atching parties and mediators based upon gender or race or sexual orientation does not assure that those individuals who happen to be members of the same identity group will have the same perspectives.”)

<sup>49</sup> Green, *supra* note 15, at 656–57.

<sup>50</sup> See Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 881–82 (2017).

as critical of ADR as he's ever been, and maybe even more so. He believes the more informal things are, the less transparent they are. And the less transparency, the more problems in our society.<sup>51</sup>

When you think about who makes the decisions in selecting the neutrals, acceptability is the issue for the people who are making the decisions. How do we get those folks in the decisionmaking process to recognize that this is an important issue and get it to resonate with them? And, yes, there could be better mentoring programs. The National Academy of Arbitrators tries to do some things with mentoring, but still people of color have to be *selected*. And the question is whether the decisionmakers who are choosing ADR professionals have considered the need for diversity in the neutrals being selected as an issue? Do they have this as a goal?

I worked once with a group of primarily African-American attorneys who represent employers. And there was some discussion about how they face a double-edged sword, because if they pick an ADR professional of color, it's assumed that person's going to be helping them in some way. If they don't, then are they going too far the other way? So, you have this dynamic for the people making the decisions who need some incentive to do this.

DONNA SHESTOWSKY: One issue that comes to mind for me, in terms of the quality of the process, is how are we assessing that quality? In some of the courts that I've worked with over the years to help evaluate their mediation programs, I've been astonished at the differential response rates. We see a high response rate for attorneys completing mediation evaluation forms and a very, very poor response rate for litigants who are also asked to fill out similar forms. In one case, there were so few litigants returning the forms, that I couldn't even run statistics (laughter) using the number that I got.

These courts are trying to rely on data, and the data they get ends up coming from attorneys. But that is not necessarily the data we need in order to assess quality. I think the courts really need to take stronger measures to get litigants to complete evaluation forms. For example, in one case, they literally were asking the litigants to complete the evaluation forms while they were still in the courthouse. For a little extra money, the litigants could have had the option to send them to me, an independent researcher. The litigants might have been less reluctant to report what they thought about the program if they had options other than to hand their forms over to court personnel. But there's great resistance.

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<sup>51</sup> Delgado, *supra* note 8, at 638 (criticizing how, whether in court or elsewhere, we have begun to "normalize the predicament of poor people seeking relief from corporate villainy").

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ELLEN WALDMAN: So, this may be limited to California, but commercial mediation has become, almost entirely, the province of retired judges. And to the degree that our judiciary is not a particularly diverse group, we now have a mediation profession that is astonishingly white and male if you look at the rosters. Again, I can only speak for California; it may be different in other parts of the country.

ELLEN DEASON: Any other comments related to the quality of court programs?

ELLEN WALDMAN: I think my suggestion complicates training. It suggests not only that we should have neutrals who are well skilled in facilitation, but that somewhere in the system we need to have a source of substantive information. Ideally, we would open up all those legal advisors' offices. But until there's an infusion of funds for that purpose, I think we in the mediation field—who are channeling our students into this venue—have to be thinking about how to get that information to the disputants who need it.

ELLEN DEASON: We've been focused on quality in court mediation programs. What about controls or incentives for quality in the business context or the company context? Rory, you mentioned competition?

RORY VAN LOO: Yes, competition is a big one and another one is the parties' reputation mechanism. It essentially boils down, to some extent, to an analysis by the company of the likelihood of the customer either leaving and taking their business elsewhere, or voicing discontent online, or to friends, and how much that's going to cost the company. I think that you can provide extra motivation for good dispute resolution by changing any of those levers of analysis.

But I see a role here for people like those in this room who have developed an expertise in dispute resolution processes because most companies are starting to understand that having good customer dispute resolution processes is good for business. And at the same time, they don't necessarily know what good customer dispute resolution looks like. That is one of the reasons why they often get it wrong—why two-thirds of people surveyed say they had some kind of customer rage in the past year. So, if given some guidance as to what procedural justice looks like, I think businesses would be inclined to implement those types of suggestions and that could impact millions of people's lives.

ELLEN DEASON: What about regulation? I believe you mentioned that. What happens when the competition isn't there?

RORY VAN LOO: Yes—it's crazy that this is actually something that needed to be done through law—but there are now laws throughout the country requiring Comcast to have a live human being available on the phone during business hours (laughter). We see more and more of these provisions. With airlines, when a customer has made a mistake and purchased the wrong date or ticket, airlines have to give them a certain amount of time to get a refund. That's not because the airlines want to do that or thought it would be a good idea for customer dispute resolution. It's because they're required by law. You see more and more of these kinds of legal rules creating contours of more acceptable dispute resolution in industries that lack as much competition. Another thing you see is that some companies are starting to do auditing of customer complaints. The FAA requires this for airlines, which must keep a log of the complaints they get and make them available. Then every few months, or years, the FAA will send someone in to go through them. And if they see patterns, then they often will write a rule to address the issue. You can imagine that we will see more of that.

ELLEN DEASON: The last general question for the panel is: What do you see for the future? Are there improvements in access that you anticipate? Are there more problems ahead? And what can academics contribute here?

ELLEN WALDMAN: I'm not sure that most of my colleagues in the mediation field agree that we should complicate our ethical canon by imposing additional duties on the mediator. So, I'm not expecting a sea-change in the way dispute resolution professionals think about their ethical obligations. I do think that there's a lot of awareness of barriers that unrepresented parties face and that the legal services world is actually working pretty hard to assist unrepresented parties.<sup>52</sup> And, I think courts are working pretty hard. If dispute resolution professionals could get on board, that would be a good thing. And again, it's going to require some creative thinking. There are some mediation groups involved. The Center for Understanding in Conflict<sup>53</sup> has a very enlightened notion of how educating parties about the law actually frees

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<sup>52</sup> Another example of a group that provides resources for unrepresented parties and improves the responsiveness of the justice system is the National Self-Represented Litigants Project in Canada. See <https://representingyourselfcanada.com/about-the-nsrp/>.

<sup>53</sup> THE CENTER FOR UNDERSTANDING CONFLICT, *Our Mission: Bringing the Human Issues to the Table* (last visited Apr. 8, 2010), available at, <http://understandinginconflict.org>.



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parties from being wedded to legal outcomes. So, maybe we will move more in that direction. But, I don't see us moving with alacrity.

DONNA SHESTOWSKY: Earlier, I talked about barriers to access to justice and some possible remedies. Some of them are really not so hard or complicated to implement, in terms of requiring lawyers to educate their clients about ADR, having courts do that too, and such. I foresee some improvements in access to justice as a result of such measures but, as a preliminary matter, it is critical that we better educate lawyers on ADR. We need more CLE programs, and perhaps mandatory courses in law school, making sure that everyone has a basic understanding of what each dispute resolution procedure entails. That way, when lawyers *do* discuss options with litigants, they can do a good job of educating them.

RORY VAN LOO: So, I've already largely answered this question by mentioning that it would be nice to have legal scholars thinking about how businesses resolve disputes with customers. One of the things that's needed so that legal scholars can contribute is just seeing these disputes inside the corporation as a civil procedure matter. The corporation is a courthouse, to some extent. For the mass majority of consumer disputes, it is really the only courthouse the consumer ever sees.

And there will also be, I suspect, a migration towards more and more of David-type companies, where you have a third party that's offering services for consumer dispute resolution. And even with small disputes, that's going to become more and more financially viable with automated systems. There was an interesting article about a lawyer who represents people for parking and speeding tickets. They're at the courthouse all day, and they go through 50 to 100 tickets on a given day. And even though each one is only \$50 or so, when you do them all and consolidate, it starts to make economic sense. So I think maybe we'll see more of that.

MICHAEL GREEN: Of course, I have the solution (laughter). One of the things I suggest is union representation. But, the reality is that union density is such a small part of the workplace right now. I looked at the parties from the *14 Penn Plaza v. Pyett* case.<sup>54</sup> Those parties don't want the courts to decide their issues. The case basically said that a union could agree to a clear and unmistakable waiver to prevent employees from pursuing claims in court. That suit got into the courts and eventually to the Supreme Court, but it wasn't the union that filed it. It was the attorney representing individual employees. And afterwards, the parties to the collective bargaining agreement entered into what

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<sup>54</sup> 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

they call a “post-Pyett protocol agreement.” The employer and the union involved in *Pyett* are trying to work out their issues through mediation and arbitration (although it's not clear what happens when the union decides not to pursue the case). But, this is a way in which they give some voice, some protection, some representation to employees dealing with disputes. Now certainly, that's one way, but it's a very small impact given union density.

But, I think this is kind of reflective of what you were saying about consumer disputes. It's activism. It's social activism. It's using social media. It's rounding up groups. It's the Black Lives Matter movement. It's all these entities getting together, to say that it's not right. And then, pushing corporations to take corporate responsibility to deal with these issues. Randall Stevenson, the CEO of AT&T came out and voiced his support for Black Lives Matter.<sup>55</sup> Ben & Jerry's has done the same thing.<sup>56</sup> You have some corporations that decide, because a movement is in place, that their ADR processes need to work in a way that values diversity and guards against prejudice. Now, what Richard Delgado says, is that none of this is clear with respect to corporations being concerned about rejecting prejudice and desiring fairer dispute resolution processes.<sup>57</sup> But it goes back to how many companies have responded by pursuing pre-dispute arbitration. And how badly, and how aggressively, and how much pre-dispute arbitration is being enforced in our society, is evidence big corporations don't really care about these issues of prejudice or access to justice through ADR.<sup>58</sup>

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<sup>55</sup> Green, *supra* note 15, at 678.

<sup>56</sup> *Id.*

<sup>57</sup> Delgado, *supra* note 8, at 633.

<sup>58</sup> *Id.* at 636 (discounting the value of formal adjudication as providing any justice in our hardened society while also lamenting that “ADR may be in the process of turning into a barren landscape for disempowered disputants as well so that both avenues are just as unpromising”). In a key example of how a movement may result in getting powerful businesses to make their ADR processes fair, the #MeToo movement, a development aimed at responding to concerns of sexual harassment and assault of women employees, has recently led some prominent law firms to abandon their mandatory arbitration policies. See Leah Litman, *#MeToo: Advocacy on Mandatory Arbitration Clauses*, TAKE CARE BLOG (Mar. 29, 2018) <https://takecareblog.com/blog/metoo-advocacy-on-mandatory-arbitration-clauses> (describing how three key large law firms, Munger Tolles, Orrick, and Skadden Arps, had decided not to require their summer associates to enter into confidential arbitration agreements). Also, the #MeToo movement recently led to collective activism by students at the University of California Berkeley when a group of students requested that law firms with mandatory arbitration policies not be allowed to interview Berkeley law students for legal positions. *Id.*

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ELLEN DEASON: In closing, I'd like to add some points from the findings of the Global Pound Conference that are relevant here. Many of the people in those discussions put a lot of emphasis on their ability to select a process for themselves. In other words, they value self-determination and autonomy in terms of designing their processes. Along with that, there's a lot of interest in step-clauses (or as some people call them, escalation-clauses), with combinations of multiple different processes. These clauses typically start with consensual processes, so this choice suggests that these disputants really do want control over the outcome. So, it appears that perhaps there is an interest in more dispute resolution alternative resolution, rather than less.

When Global Pound Conference participants were asked where governments and administrators should focus their attention to promote better access to justice in the international commercial context, they favored pre-dispute or early-stage case evaluation or assessment systems using third-party advisors who will not be involved in proceedings. The second choice recommendation was to insert a step with a non-adjudicative process (mediation or conciliation) before a party can initiate an adjudicative process, either in the form of a compulsory process or something the parties can "opt-out" of. These approaches may add a layer, but especially the first approach could provide unrepresented parties with better information about how their case would be resolved and thus better settlement options.

When asked what innovations and trends are going to have the most significant influence on the future of commercial dispute resolution, the highest ranked response indicated a desire for greater emphasis on collaborative, instead of adversarial, processes for resolving disputes, which would lead to an expansion of mediation. The second-ranked response supported changes in corporate attitudes toward conflict prevention, which is consistent with our earlier discussion of consumer and employment dispute resolution programs. Participants favored improving pre-dispute processes to *prevent* disputes. I think that's something we often gesture toward in our field, but we haven't really focused on it yet. This might be an area where dispute resolution academics could contribute in terms of more theory, as well as more empirical work.

So, finally, we'd like to hear from you. Please come up to the microphone, because we are recording. Identify yourself and where you're from. We have about 20 minutes left, so there is plenty of time for comments.

PAUL KIRGIS: Hi. Thanks for a great panel. I'm Paul Kirgis, Dean at the University of Montana School of Law. I'm on the Access to Justice Commission in Montana and we have number of access to justice problems, like most states do. One of the very big ones is in divorce cases, where there is an enormous backlog. And the difficulty for the litigants is not that they can't

get *to* court. They're *in* court and they can't get *out*. They can't get a resolution of their divorce. And of course, there are big power imbalances in those cases that mean if you don't have a process that's moving, the weaker party is going to lose and ultimately often give up.

And so, one of the things that we're looking at is building a mediation program around the state with the explicit purpose of speeding the process up to get people through it more quickly. The difficulty that I've been wrestling with as a member of this Commission—backing up, Ellen, to your point about mediator quality—is how do you know when you've given enough training to a mediator, and what kind of training, so the mediator will do more good than harm in that situation? I think most of us who are in this world have seen mediators do a lot of harm. The odds of successfully getting a full forty-hour training implemented are very small—people won't do that. So, we're looking at less than that. And then, what's the right metric? How do you make that assessment so that you know that you're doing more good than harm? And, I'd love to hear from others in the room after the panel if other people have thoughts on this.

ELLEN WALDMAN: Do you have any way to separate out the cases—cases that are just involving kids, no assets; cases just involving uncomplicated assets; cases involving complex pensions, etc. etc. I mean, the more money the couple has, the less likely they're going to be in your program, right?

PAUL KIRGIS: Yes, we're in Montana; there isn't any money (laughter). The main screen that we're doing is for domestic violence. We're looking at the Michigan tool; there are some things out there. They're trying to get the worst of the domestic violence cases out. But, otherwise, we're not screening for financial matters.

ELLEN WALDMAN: And the parties are unrepresented?

PAUL KIRGIS: Yes.

ELLEN WALDMAN: I think they need both process training and substance training. That would be my advice. I don't think you can have a divorce mediator who's not going to be knowledgeable about custody, support, division of marital property, etc. etc.

DONNA SHESTOWSKY: I'm not aware of any research that provides a magic number regarding how many hours of training are needed, in a way that can answer your question. But, I have some good news: RSI and the ABA put

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together a group of researchers and policymakers, myself included, who worked together for about two years to design model forms for evaluating mediation. We have model forms for parties, for mediators, and for attorneys, along with guidelines for how to interpret the answers to the questions on the forms . . . what meaning to make out of them . . . and suggestions for how to tailor your own survey based on our model questions. So, in terms evaluating your program, we have tools available for free, online.<sup>59</sup>

ELLEN WALDMAN: I do have one suggestion: I know that there are community mediation programs that have developed family mediation programs. So they've taken your journey and there are folks that you could talk to, to say what has worked, what modules you need, what modules you can jettison. So, they give you some advice.

ELLEN DEASON: And this isn't helpful, but I think it might be worth pointing out that this question takes us back to one of the original critiques of mediation. Trina Grillo, in the context of divorce mediation, pointed out the harms that can come about.<sup>60</sup> So clearly, with all of the progress we've made over the decades, we're still grappling with some of these very basic issues.

PAUL RADVANY: Hi, I'm Paul Radvany. I teach the Securities Litigation and Arbitration Clinic at Fordham Law School. I also serve as a pro-bono mediator for the Southern District and the Second Circuit. I tend to agree with your comment that it is difficult to be a mediator for someone who is *pro se*, which is why I actually refuse to take those cases. So, I'm wondering what your thoughts are on solutions for them that don't involve providing representation.

In securities arbitration, as you may know, there are a handful of mediators around the country who resolve 80-90% of these cases and they are extraordinarily evaluative. I was wondering what your thoughts are on whether one potential solution would be to allow mediators, or to train mediators, to be much more evaluative. And, if not, just to say cases are not appropriate for mediation with a *pro se* plaintiff. They should have their case resolved in court or arbitration, where someone can take all the laws that are available—that the *pro se* litigant is not knowledgeable about—into account in making a determination.

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<sup>59</sup> RSI, *Model Surveys* (last visited Apr. 8, 2018), available at, <https://www.aboutrsi.org/model-surveys>.

<sup>60</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

ELLEN WALDMAN: Based on your experience, do you think that it would be possible to pull together what a litigant would need to know in order to make an informed judgment? Could you imagine a set of materials that would give the disputants what they need?

PAUL RADVANY: I have to say that when we negotiate or mediate our cases, the memos are really long and there are lots of factors. And it's taken me ten years to feel very competent in advising my clients about a number that is helpful, which is why it's very evaluative in my field. I actually think in this area it would be pretty impossible for a pro se litigant to determine what their case is worth. It might be easier in consumer disputes.

ELLEN WALDMAN: Yes. So, you either need representation, or maybe these are just not the cases for mediation.

JENNIFER BROWN: I'm Jennifer Brown, the Dean of Quinnipiac Law School. I'm interested in your thoughts about judges as mediators and their potential to increase access to justice. Ellen, in your work on the role of norms in mediation, you've acknowledged that some mediators appropriately educate parties about the substantive law that would govern their cases. Certainly, we know that judges are pretty good at that. On the other hand, people who train judges to become mediators sometimes find that judges are quick to separate the parties into caucus and may fail to appreciate the value of interaction and mutual problem solving by the parties—something that's easier to achieve when the parties stay in the room together.

I'd like to hear from you or others on the panel about the values that can clash in mediation, especially when judges or retired judges mediate. We are facing huge challenges in providing access to justice, especially in housing and family courts. In light of these challenges, maybe the tradeoff with judges who mediate is OK: they might be very evaluative and might send parties into caucus quickly. Could we rest easy, somehow, knowing that this theoretically flawed mediation is actually increasing access to justice? Or are we giving up too many of the values of mediation?

ELLEN WALDMAN: Sometimes when I am giving this pitch about the importance of legal norms, I have an out-of-body experience where I think "Oh come on! Isn't that an overstatement!?" And I'm not the litigation romanticist that I think it sometimes appears I am. And I am horrified at how much "judicial mediation" has come to define the field in Southern California.

I guess I'm just really looking for a neutral who has a lot of skills. And I think that being able to sit with two angry parties in the same room and help them have a conversation is at the heart of the process. So, if you asked me,

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“What should we give up? Should we give up knowledgeable decisionmaking on the part of disputants, or should we give up the capacity to foster what might be an illuminating and restorative conversation?” I don’t really want to make the choice, and I’m not sure that we have to. Although, maybe we need to make more trade-offs than we are willing to say out loud.

JUDITH RESNIK: Judith Resnik from Yale Law School. My question is about the role of legal academics in affecting the values and norms of ADR providers. I hope the panelists will comment on whether we, inside the academy, can play a role in supporting a shift towards toward transparency and accountability for ADR providers in either the public or the private sectors. For example, I know that Professor Nancy Welsh has been instrumental in working with the ABA Section of Dispute Resolution, which supported the Consumer Financial Protection Bureau’s (CFPB) published rule to have more accountability in arbitration. The focus of the work of the CFPB was both on preventing enforcement of one-sided mandates banning consumers from participating in class actions and on creating obligations by arbitration providers to provide data. Thus the goals were to create accountability about what had transpired within arbitrations. While that effort was aborted due to the Vice President’s vote to break the tie in the Senate, the ABA Dispute Resolution Section was—and is—an important voice. And its members include many who are themselves providers of dispute resolution.

So my question is about the impact of our teaching, programs and the functioning of the AALS ADR section, and of your writing on changing norms. To the extent there are concerns—that all of you have differently expressed about equality, access, capacity of users, and the like—where are “we” in responding? What metrics of quality and what qualities for alternative dispute resolution should we encourage and help to shape? My underlying concern is about the opacity of both processes and outcomes, and about the capacity of repeat players (to borrow from Marc Galanter) to play for rules that may not be generative for all involved.

Let me be concrete. After looking at American Arbitration Association records reporting arbitration use for consumers, we (students and myself) identified fewer than sixty people per year using arbitration against AT&T, which had 85 to 120 million customers during that time period (2009-2017).<sup>61</sup> We focused on AT&T because it had pressed the U.S. Supreme Court to enforce class action waivers. Finding that information took lots of time and, given data challenges, provides a glimpse but not an absolute count. My

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<sup>61</sup> Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2807–09 (2015); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. (forthcoming, 2018).

question then is how to structure information forcing into ADR, and more generally how to generate norms of openness to third parties. And when members of the academy or others will insist that what is being provided is not “their” form of ADR.

ELLEN WALDMAN: One of the problems with alternative dispute resolution is confidentiality. We say it's essential to our process, and yet, it can hide a multitude of sins. In California, we have some pretty abominable case law, culminating in the *Cassel* case.<sup>62</sup> For those of you unfamiliar with it, that case effectively says that attorney malpractice is within the oral discussions that are protected as part of the mediation process. And there are many mediation academics who have said, “Okay, that's a bridge too far. We didn't really mean to protect professional malpractice.” So, I think that you can see, within the academy, thoughtful objections to rules and ethics mandates that seem to be hurting the people we hope to serve.

RORY VAN LOO: Lawyers have some allies inside the corporation at this time in the transformation towards transparency and accountability. They are the customer service professionals who attend the trade shows and go to conferences like this each year. Most of them believe that resolving consumer disputes in line with justice and fairness is a good thing. What they need, in my mind, is better data and better arguments to make the case to decisionmakers inside corporations that this is the appropriate thing to do. There are a number of studies that have come out recently that start to link high profits to customer dispute resolution, but they're vague. So that's one of the ways.

And, another thing that is going on, is that a lot of lawyers now are being asked to lead compliance departments inside corporations, and compliance groups are now co-equal to the legal departments in most major corporations. So if we are teaching our students these principles and they are in the compliance departments (because the legal implications can become compliance issues), when they are aware of these issues, that's one avenue for rolling it out.

MICHAEL GREEN: So, when I heard your comment, I was thinking about the whole mandatory arbitration movement. In terms of scholarly reactions, there is one extremist group I call the “haters” (laughter).<sup>63</sup> If there

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<sup>62</sup> *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011).

<sup>63</sup> Although my articles have not used the terminology “haters,” I have captured this notion by referring to any commentator or advocate who hates or “attacks every aspect of



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is anything that involves mandatory arbitration, they hate it—it will not work under any circumstances. And another extremist group counters this approach in a way that I have started to call them “apologists.”<sup>64</sup> If there is any kind of mandatory arbitration agreement, it works for them—regardless of the circumstances or concerns about bargaining fairness, the agreement should be enforced no matter what others think. A third group is probably made up of more pragmatic people and I claim to be a part of that group. But overall, most of the scholarly commentary out there about mandatory arbitration is critical.

So, with all this critical commentary regarding mandatory arbitration, why do we have the situation we just had in October 2017, when Vice President Mike Pence provided the winning vote to stop the Consumer Financial Protection Bureau (CFPB) from establishing a rule to limit mandatory arbitration in class claims that had been created in response to five years of research on the subject conducted by CFPB?<sup>65</sup> Congress took this action despite criticisms of mandatory arbitration in the finance industry due to scandals involving broad consumer complaints related to misdeeds by Wells Fargo and Equifax. Yet, Congress, by the narrowest of margins with Pence’s vote, and most of corporate America, seemed to be in support of the vote to stop any bans on mandatory arbitration for class claims. You mentioned the ABA Section of Dispute Resolution. And we have some other entities and processes that could help; we have the consumer due process protocol; we have the employee due process protocol. We have a lot of data indicating concerns and scholars are writing about them.

But again, it comes back to what I mentioned about acceptability when choosing a neutral. The decisionmakers have to really feel that there’s something there to drive them business-wise to do it if we ever reach a repeal of mandatory arbitration. And that makes me think about the role of affirmative action. In *Grutter*,<sup>66</sup> you saw companies signing amicus briefs saying how important it was to support affirmative action efforts. That was the issue for them in terms of their motivation and likely originated from activities that sprung from the civil rights movement. Also, there are groups of corporate general counsels who have issued a call to action, saying to law firms they

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arbitration as a nonstarter.” See Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 86 IND. L. J. 367, 414 (2012).

<sup>64</sup> Likewise, I did not use the term “apologists.” I have captured this notion by referring to any commentator or advocate who apologizes for any negative impacts of arbitration by refusing to accept that “real concern exists when an agreement to arbitrate” is mandated because the result is better than the court system. *Id.*

<sup>65</sup> See Nicholas Denny et al., *The Workers’ View: Why the NLRB was Correct in Declaring Mandatory Employment Arbitration Illegal*, 35 ALTERNATIVES TO THE HIGH COST OF LITIG. 165 (2017).

<sup>66</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

employ that “You have to have more minority attorneys and women representing you.”

What drives that? What is motivating these corporations to do that? I don’t know if it is scholarly commentary, but there is something that’s resonating with them. Possibly, they are responding to actions arising from some strong movement.

ELLEN DEASON: I’m sorry to have to cut this off, but we are over time. Let me remind you to gather in the front for a very brief business meeting. And thank you to all of you for attending and participating (applause).